

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANNAMARIE ALT,)	
)	
Plaintiff,)	Case No. 1:11-cv-29
)	
v.)	Honorable Robert J. Jonker
)	
COMMISSIONER OF)	
SOCIAL SECURITY,)	
)	<u>REPORT AND RECOMMENDATION</u>
Defendant.)	
)	

This was a social security action brought under 42 U.S.C. §§ 405(g) and 1383(c)(3), seeking review of a final decision of the Commissioner of Social Security denying plaintiff's claims for disability insurance benefits (DIB) and supplemental security income (SSI) benefits. On August 23, 2011, the court entered a judgment reversing the Commissioner's decision and remanding the matter to the Commissioner under sentence four of 42 U.S.C. § 405(g) for further administrative proceedings. (docket # 22) The matter is before the court on plaintiff's November 16, 2011 motion for \$2,567.00 in attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. (docket # 25). I recommend that plaintiff's motion be granted in part and denied in part and that a judgment be entered in plaintiff's favor in the amount of \$1887.50.

Discussion

Plaintiff's motion is timely. The judgment remanding this matter to the Commissioner did not become a "final judgment" within the meaning of the EAJA until October 22, 2011, when the government's 60-day period within which to appeal the judgment expired. *See Melkonyan v. Sullivan*, 501 U.S. 89, 102 (1991). Plaintiff filed her motion "within thirty days of final judgment" as required by statute, 28 U.S.C. § 2412(d)(1)(B).

The EAJA provides in relevant part:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . ., including proceedings for judicial review of agency action, brought by or against the United States . . ., unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A); *see Astrue v. Ratliff*, 130 S. Ct. 2521, 2525 (2010); *Howard v. Barnhart*, 376 F.3d 551, 554 (6th Cir. 2004). The Sixth Circuit has identified three conditions which must be met to recover attorney's fees under the EAJA: (1) the claimant must be a prevailing party; (2) the government's position must be without substantial justification; and (3) there are no special circumstances which would warrant a denial of fees. *See Marshall v. Commissioner*, 444 F.3d 837, 840 (6th Cir. 2006). Plaintiff is a prevailing party under this court's judgment remanding this matter to the Commissioner. *See Shalala v. Schaefer*, 509 U.S. 292, 298 (1993). Plaintiff is a financially eligible person under the EAJA. Defendant offers no special circumstances which might warrant denial of fees and has made no attempt to satisfy the burden of demonstrating that the government's position was substantially justified. *See Peck v. Commissioner*, 165 F. App'x 443, 446 (6th Cir. 2006). Plaintiff is entitled to an award of attorney's fees under the EAJA.

1. Hours Claimed

The United States Court of Appeals for the Sixth Circuit has cautioned lower courts against “rubber stamping” EAJA fee applications. *See Begley v. Secretary of Health & Human Servs.*, 966 F.2d 196, 200 (6th Cir. 1992). The EAJA requires “an itemized statement from [the] attorney . . . representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.” 28 U.S.C. § 2412(d)(1)(B).

Plaintiff’s attorney represents to the court that he spent a total of 15.1 hours on this case. (docket # 26-3). Defendant has no objection to the reasonableness of the hours claimed. The hours claimed are reasonable for the tasks performed. I recommend that plaintiff’s attorney receive credit for all 15.1 hours listed in his itemized statement.

2. Hourly Rate

The EAJA generally caps the hourly rate for attorney’s fees at \$125 per hour. 28 U.S.C. § 2412(d)(2)(A). “[T]he statutory rate is a ceiling and not a floor.” *Chipman v. Secretary of Health & Human Servs.*, 781 F.2d 545, 547 (6th Cir. 1986). Plaintiff seeks to recover at a rate of \$170 per hour, significantly above the statutory cap. The EAJA specifies that “attorney’s fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.” 28 U.S.C. § 2412(d)(2)(A). The Supreme Court has determined that the statutory \$125 per hour cap applies “in the mine run of cases.” *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002).

“In requesting an increase in the hourly-fee rate, [p]laintiff[] bear[s] the burden of producing appropriate evidence to support the requested increase.” *Bryant v. Commissioner*, 578 F.3d 443, 450 (6th Cir. 2009). Plaintiff’s attorney argues that he should receive an increased hourly rate based on inflation and the Consumer Price Index. (docket # 26 at ID # 537). In *Bryant*, the Sixth Circuit held that this was not sufficient evidence to carry the plaintiff’s burden. *Id.* at 450; accord *O’Neal v. Commissioner*, 1:08-cv-723 (W.D. Mich. Jan. 27, 2011) (“[T]his court is bound by *Bryant*, where the Sixth Circuit found that evidence of inflation, supported by the CPI, by itself, does not justify an increase in EAJA’s statutory fee cap” and “[w]ithin this district, judges have consistently held that evidence of changes to the CPI is insufficient proof to justify an increase in the statutory cap.”); *Sassan v. Astrue*, No. 1:08-cv-120, 2010 WL 3843767, at * 1 (W.D. Mich. Sept. 28, 2010).

Plaintiff’s counsel argues that he recently received approval for \$170 hourly fee in a social security case in the United States District Court for the Eastern District Court of Michigan. (docket # 26-1 at ID # 541, ¶ 10). The one-page order entered in *Kemeter v. Commissioner*, No. 1:10-cv-12381 (E.D. Mich. Oct. 4, 2011), does not address the statutory cap and therefore is not persuasive authority. I find that plaintiff has not carried her evidentiary burden to justify compensation at any rate above the statutory cap. I further find that an award at the maximum hourly rate provides adequate and appropriate compensation for the work performed. Multiplying the 15.1 hours expended by counsel and the \$125 per hour rate results in a \$1,887.50 total. Plaintiff is entitled to an award of EAJA attorney’s fees in the amount of \$1,887.50.

Recommended Disposition

For the reasons set forth herein, I recommend that the court enter an order granting plaintiff's motion in part and denying it in part, and that the court enter a judgment in plaintiff's favor against defendant in the amount of \$1,887.50.

Dated: November 18, 2011

/s/ Joseph G. Scoville

United States Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within fourteen days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. MICH. LCivR 72.3(b). Failure to file timely and specific objections may constitute a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Branch*, 537 F.3d 582, 587 (6th Cir.), *cert. denied*, 129 S. Ct. 752 (2008); *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006). General objections do not suffice. *Spencer v. Bouchard*, 449 F.3d 721, 724-25 (6th Cir. 2006); *see Frontier*, 454 F.3d at 596-97; *McClanahan v. Comm'r of Social Security*, 474 F.3d 830, 837 (6th Cir. 2006).